

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000545-MR

DEANNA MAHONEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 17-CR-001207

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND L. THOMPSON,
JUDGES.

JONES, JUDGE: The Appellant, Deanna Mahoney, appeals from the February 28, 2018, order of forfeiture by the Jefferson Circuit Court. The Jefferson Circuit Court ordered the forfeiture of \$2,164.00 seized from Mahoney after she pleaded guilty to charges of trafficking in a controlled substance – first degree, methamphetamine and tampering with physical evidence. Having reviewed the

record and applicable law, we vacate the trial court's order and remand this matter for additional findings of fact.

I. BACKGROUND

On March 16, 2017, during a traffic stop, police discovered 14.85 grams of methamphetamine hidden in Mahoney's crotch area. Police seized the drugs along with \$2,164.00 in cash which was found in Mahoney's purse.

Mahoney was subsequently arrested and indicted by the Jefferson County grand jury on April 25, 2017, for the offenses of trafficking in a controlled substance first degree and tampering with physical evidence. Eventually, Mahoney was offered a plea deal by the Commonwealth. The deal included the charges from the April 25 indictment as well as charges from three other separate indictments pending against Mahoney. Mahoney accepted the Commonwealth's offer; she agreed to plead guilty in all four indictments in exchange for amended charges in three of those indictments for a recommended total sentence of ten years and a recommendation of shock probation after Mahoney served sixty days. Mahoney waived her right to a separate sentencing hearing; the parties agreed to pass the forfeiture of the \$2,164.00 to the shock probation hearing scheduled for February 19, 2018.

On February 19, 2018, the trial court held a shock probation and forfeiture hearing. Each party filed a motion and the trial court took the issues

before it under submission. No witnesses were called, and Mahoney did not testify at the hearing. On February 28, 2018, by order, the trial court denied Mahoney's motion to have the \$2,164.00 returned. The trial court stated that Mahoney had not met her "burden to defeat the presumption of forfeiture." As such, the trial court ordered the \$2,164.00 be forfeited pursuant to Kentucky Revised Statutes (KRS) Chapter 218A, specifically, KRS 218A.415 and KRS 218A.420. It is from the trial court's February 28, 2018, forfeiture order that Mahoney now appeals to this Court.

II. STANDARD OF REVIEW

Findings of fact made by a trial court are reviewed under the clearly erroneous standard. Kentucky Rules of Civil Procedure (CR) 52.01. However, rulings of law are reviewed de novo. *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006).

III. ANALYSIS

On appeal, Mahoney submits the trial court incorrectly applied KRS 218A.410.

KRS 218A.410 provides, in relevant part, as follows:

(1) The following are subject to forfeiture:

...

(j) Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in

violation of this chapter, all proceeds, including real and personal property, traceable to the exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of this chapter; except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by him or her to have been committed or omitted without his or her knowledge or consent. It shall be a rebuttable presumption that all moneys, coin, and currency found in close proximity to controlled substances, to drug manufacturing or distributing paraphernalia, or to records of the importation, manufacture, or distribution of controlled substances, are presumed to be forfeitable under this paragraph. The burden of proof shall be upon claimants of personal property to rebut this presumption by clear and convincing evidence. The burden of proof shall be upon the law enforcement agency to prove by clear and convincing evidence that real property is forfeitable under this paragraph[.]

Mahoney, relying on *Osborne v. Commonwealth*, 839 S.W.2d 281, 284 (Ky. 1992), maintains that the Commonwealth “must first produce some evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction.” She argues that the trial court failed to make any findings with respect to traceability regarding the \$2,164.00 found in her purse. Mahoney argues remand is necessary.

In Kentucky, it is well established that the Commonwealth bears the burden of proof in forfeiture actions. *Id.* In *Osborne*, the Kentucky Supreme Court examined KRS 218A.410(1)(j). The *Osborne* Court stated as follows:

On examination of the foregoing statute, it is apparent that any property subject to forfeiture under (j) must be traceable to the exchange or intended violation. This requirement exists without regard to the presumption which appears later in the statute

Recognizing the difficulty of proof with respect to showing a connection between currency and drug transactions, the General Assembly created a presumption whereby currency found in close proximity to controlled substances was presumed to be forfeitable subject to the right of the owner to rebut the presumption. While the presumption would, at first blush, appear to dispense with the requirement of traceability, we believe the two must be construed harmoniously so as to give effect to the intention of the General Assembly.

The Commonwealth may meet its initial burden by producing slight evidence of traceability. Production of such evidence plus proof of close proximity, the weight of which is enhanced by virtue of the presumption, is sufficient to sustain the forfeiture in the absence of clear and convincing evidence to the contrary. In practical application, the Commonwealth must first produce some evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction. Additional proof by the Commonwealth that the currency sought to be forfeited was found in close proximity is sufficient to make a *prima facie* case. Thereafter, the burden is on the claimant to convince the trier of fact that the currency was not being used in the drug trade. . . .

Id. at 284.

Following its summary of the proper standards, the Kentucky Supreme Court remanded the denial of the forfeiture order in *Osborne* because “the trial court failed to make findings with respect to traceability and failed to

determine whether appellant's evidence as to the source of the currency was credible." *Id.* at 284.

In this case, the trial court failed to make any findings of fact. The trial court's February 28, 2018, order states only "Considered & denied. [Defendant] has not met her burden to defeat the presumption of forfeiture." As set forth in *Osborne*, this requires us to vacate the forfeiture and remand this matter for additional findings of fact consistent with *Osborne*. In addition to proximity, the trial court must determine whether the Commonwealth adduced some minimal evidence of traceability between the money and drug trafficking. If so, the Commonwealth is entitled to the rebuttal presumption. Thereafter, the trial court must determine whether Mahoney's explanation that the money was from a check she cashed from her late father's estate that she was using to pay bills is sufficient to overcome the presumption.

To this end, we reiterate that we are remanding because the record does not contain sufficient findings by the trial court for us to conduct a meaningful review. We express no opinion regarding the ultimate outcome of this matter as we decline to make our own findings. Our function is to review the findings made by trial courts to determine if they are supported by the record; it is not to make findings in lieu of the trial court.

IV. CONCLUSION

For the above stated reasons, we VACATE the February 28, 2018, order of the Jefferson Circuit Court and REMAND and this matter for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Cicely J. Lambert
Louisville, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General

Thomas A. Van De Rostyne
Assistant Attorney General
Frankfort, Kentucky